Cal/EPA

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MEMORANDUM

ATTACHMENT 9

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TO: Walt Pettit
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FROM: William R. Attwater
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DATE: SEP 16 1996

SUBJECT: ADOPTION OF WASTE DISCHARGE REQUIREMENTS FOR RESPONSE ACTIONS AT CERCLA FACILITIES

I. INTRODUCTION

The purpose of this memorandum is to address several issues that have arisen recently regarding the authority of the regional water quality control boards (RWQCBs) to adopt waste discharge requirements, including NPDES permits, for discharges related to cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[1] CERCLA response actions occur at National Priority List (NPL) sites and non-NPL federal facilities. In most cases, a discharger or responsible party is required to apply for and obtain waste discharge requirements prior to initiating a discharge of waste. As discussed below, however, there are limited circumstances in which the RWQCBs should not require the discharger to apply for or obtain waste discharge requirements prior to initiating a discharge related to a CERCLA response action. Even in these limited circumstances, however, it may be permissible for the RWQCBs to prepare and adopt waste discharge requirements without requiring a report of waste discharge.

II. SECTION 121(e)(1) OF CERCLA

Section 121(e)(1) of CERCLA provides that:

> "No federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." 42 U.S.C. § 9621(e)(1).

[1] 42 U.S.C. § 9601 et seq.

This section affects the RWQCBs' ability to require waste discharge requirements, including NPDES permits, in the following limited circumstances.

A. On-site

Section 121(e)(1) applies only to "on-site" discharges. There are no constraints on the RWQCBs' ability to require waste discharge requirements for off-site discharges. The U.S. EPA has defined "on-site" as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action".[2] If the actual point of discharge is on site, but the receiving water flows directly off-site, the U.S. EPA still considers it to be an on-site discharge.[3] The portion of the definition of on-site that refers to "areas in very close proximity to the contamination necessary for implementation" is vague, in that it is not possible to know from the definition itself how far away from the area of contamination the U.S. EPA would consider "in very close proximity".[4] However, the U.S. EPA has stated that it will interpret this provision narrowly.[5] If the response action could be conducted within the areal extent of contamination, then areas in close proximity to the contamination would not be "necessary for implementation" and, therefore, would not be considered "on-site". It is important to note that the term "on-site" is related to the area of contamination, not to the boundaries of the facility. In fact, the

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[2] National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R., § 300.400(e)(1).

[3] Preamble to the 1988 proposed NCP, 53 Fed Reg 51394, 51407 (December 11, 1988).

[4] Ohio v. U.S. EPA, 997 F.2d 1520, 1549 (D.C. Cir. 1993). In Ohio, several states, including California, challenged the U.S. EPA's promulgation of portions of the NCP, including the definition of "on-site". The court held that the definition was ambiguous, but that it could not make a ruling on the definition without an application of the definition to a specific set of facts. The court did conclude, however, that the definition is not invalid on its face.

[5] "It is EPA's general policy to invoke the permit exemption only when the area within very close proximity to the contamination is necessary for implementation of the portion of the response action relating to the hazardous substance with which it is in proximity." Preamble, supra, 53 Fed.Reg. 51394, 51406.

U.S. EPA expressly rejected a definition of "on-site" that was synonymous with the definition of "facility".[6]

A few examples may guide the RWQCBs in interpreting the term "on-site". At the Powell Road Landfill in Ohio, leachate had migrated in the ground water to the other side of a river that bordered the landfill. The response action included extraction and treatment of leachate and contaminated ground water, with a discharge to the river. The U.S. EPA determined that the discharge was off-site and, therefore, needed an NPDES permit.[7] In a similar vein, the record of decision (ROD) for the B & B Chemical Company in Florida considered alternatives that included ground water extraction and treatment system with a discharge to a surface water that is located approximately 800 feet from the site. The U.S. EPA believed that the proposed surface water discharge was off-site because it stated that an NPDES permit would be required.[8]

B. CERCLA Decision Document

Section 121(e)(1) applies only to response actions "selected and carried out in compliance" with CERCLA section 121. A response action is "selected" when the lead agency, which is the U.S. EPA for private facilities and the federal agency for federal facilities, prepares a decision document, usually an ROD, that describes the action that will be undertaken. Section 121(d) requires response actions to conform with all substantive federal and more stringent state standards, requirements, criteria, and limitations that are applicable or relevant and appropriate to the action. In discussing the application of section 121(e)(1), the U.S. EPA emphasized that "the lead agency must always comply with the substantive requirements that would otherwise be included in a permit".[9] Furthermore, the selection of response actions includes specific public participation requirements, including public notice, an opportunity

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[6] Preamble, supra, 53 Fed.Reg. 51394, 51407.

[7] Powell Road Landfill ROD, EPA I.D. No. OHD000382663 (9/30/93).

[8] B & B Chemical Co., Inc., ROD, EPA ID No. FLD004574190 (9/12/94).

[9] Preamble, supra, 53 Fed.Reg. 51394, 51407.

to comment, and written responses to comments received.[10] Therefore, unless and until there is a CERCLA decision document that describes the discharge, includes all of the substantive requirements that would otherwise be included in waste discharge requirements, and has been subjected to full public participation, section 121(e)(1) does not apply. If a proper decision document is prepared subsequent to an RWQCB adopting waste discharge requirements for an on-site discharge, the RWQCB may, at its discretion, consider rescinding the waste discharge requirements.

C. Non-NPL Facilities

It is not entirely clear whether section 121(e)(1) applies to CERCLA cleanups at non-NPL federal facilities. Federal facilities are addressed by CERCLA section 120. Section 120(a)(4) provides that:

> "State laws concerning removal and remedial action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a state law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality." 42 U.S.C. § 9620(a)(4).

However, in the NCP, the U.S. EPA expanded the application of section 121(e)(1) to include on-site response actions conducted pursuant to CERCLA section 120.[11] Because the U.S. EPA's application is arguably overbroad and there are no federal court decisions that address the issue, the RWQCBs may decide to require waste discharge requirements for discharges

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[10] See 42 U.S.C. § 9617; 40 C.F.R. §§ 300.415(m), 300.430(f)(3).

[11] "No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122." 40 C.F.R. § 300.400(e)(1) (emphasis added).

related to both on-site and off-site response actions at non-NPL federal facilities.

D. Non-CERCLA Wastes

CERCLA applies to the cleanup of "hazardous substances" and "pollutants or contaminants" as defined in CERCLA. These definitions specifically exclude petroleum. In addition, there are other constituents regulated by the RWQCBs as "wastes" under the Water Code that are not CERCLA hazardous substances or pollutants or contaminants, including certain pesticides. Discharges associated with cleanups of such non-CERCLA constituents are not subject to CERCLA section 121(e)(1). Even if a discharge involves hazardous substances, but the discharge is not related to a CERCLA response action, the constituents would not be considered CERCLA constituents and the discharge would not be subject to section 121(e)(1). If non-CERCLA constituents are commingled with CERCLA constituents, the RWQCB should adopt waste discharge requirements for the total discharge, regardless of the location of the CERCLA discharge.

E. Multiple Discharge Points

Where a discharge takes place at multiple discharge points, some of the discharge points may be on-site while others may be off-site. If any of the discharge points are off-site, then section 121(e)(1) does not apply. Waste discharge requirements may be required by the RWQCB for the entire discharge because discharge portion of the response action is not "conducted entirely on-site".

F. Conveyance Facilities

In order to determine whether the discharge is on-site or off-site, it is necessary to determine the precise location of the discharge point. For point source discharges, reference to the Federal Clean Water Act is appropriate. Under the regulations that implement the Clean Water Act, a "discharge of a pollutant" means "any addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source'". 40 C.F.R. § 122.2. A "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to any

pipe, ditch, channel . . . from which pollutants are or may be discharged". Ibid. Therefore, if a conveyance facility is used to transfer the wastes, the discharge occurs at the point where the conveyance facility discharges to the receiving waters. If the discharge point is off-site, section 121(e)(1) does not apply.

III. IMPLICATIONS OF SECTION 121(e)(1)

Section 121(e)(1) must be read in context with the rest of the statute. CERCLA contains two provisions that preserve the RWQCBs' authority to enforce water quality laws. Section 114(a) states that "nothing in [CERCLA] shall be construed or interpreted as preempting any state from imposing any additional liability or requirements with respect to the release of hazardous substances within such state". 42 U.S.C. § 9614(a). Section 302(d) states that "nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other federal or state law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants". 42 U.S.C. § 9652(d).

Section 121(e)(1) could be interpreted in two different ways. It could be read as preempting the authority of the RWQCBs to adopt waste discharge requirements for properly selected on-site discharges related to CERCLA response actions. Alternatively, it could be understood to mean that the RWQCBs may not require the discharger to obtain waste discharge requirements as a condition to initiating the discharge, but that the RWQCBs may still adopt waste discharge requirements. In U.S. v. Denver, the court held that section 121(e)(1) is not an express preemption provision.[12]

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[12] U.S. v. Denver (D.Colo. 1996) 916 F.Supp. 1050. Denver adopted a cease and desist order that ordered a responsible party to cease performing the CERCLA response action that it was ordered to perform by the U.S. EPA after the response action was selected in an ROD. The court found that it was physically impossible to comply with both the cease and desist order and the U.S. EPA order that implemented the ROD. The court also found that the cease and desist order was an obstacle to the full purposes and objectives of CERCLA, since it prohibited a response action selected in the ROD. Therefore, the court held that the cease and desist order was void pursuant to the Supremacy Clause. The court did not reach the U.S. EPA's claim that the cease and desist order was invalid under section 121(e)(1).

In either interpretation, section 121(e)(1) arguably conflicts with sections 114(a) and 302(d).[13] It is a rule of statutory construction that all of the provisions of a statute should be read so that they are harmonized.[14] The conflict is minimized if section 121(e)(1) is read to merely preclude RWQCBs from requiring the discharger to obtain waste discharge requirements prior to initiating a discharge. Such a reading retains virtually all of the RWQCBs' authority, consistent with section 114(a), and minimizes the modification of the dischargers' obligations under the Water Code, consistent with section 302(d).

This interpretation is also consistent with the purpose of section 121(e)(1). Under most environmental permitting schemes, a permit is required prior to initiating any activity that falls within the scope of the permitting scheme. For example, under the RWOCBs' waste discharge permitting scheme, the waste discharge requirements must be obtained before the discharge of waste may commence. In some cases, it may be time-consuming to go through the administrative process to obtain a permit. It may also be possible for a party to enjoin an agency's issuance of a permit, resulting in additional delays. As stated by the U.S. EPA Administrator in In the Matter of the Former Weldon Spring Ordinance Works, the purpose of section 121(e)(1) is to "avoid redundant procedural permitting steps that could delay cleanups". Adoption of waste discharge requirements prior to initiation of the discharge should, therefore, not delay cleanup.

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[13] In U.S. v. Colorado (10th Cir. 1993) 990 F.2d 1565, the court recognized this potential conflict. The U.S. EPA, in attempting to prevent Colorado from enforcing its RCRA compliance order at the Rocky Mountain Arsenal, argued that Colorado could enforce its laws only through the identification of applicable or relevant and appropriate requirements (ARARs) process in section 121, and that allowing Colorado to enforce its compliance order would violate section 121(e)(1). The compliance order required the Army to maintain its RCRA interim status. Under RCRA, "facility owners and operators with interim status are treated as having been issued a permit until EPA or [an authorized state] makes a final determination on the permit application." 40 C.F.R. § 270.1. The court held that where a state has independent authority over the cleanup of a facility, sections 114(a) and 302(d) preserve the state's exercise of that authority even if a CERCLA response action is underway. The court did not attempt to reconcile section 121(e)(1) because it found that the compliance order was not technically a permit.

[14] See, e.g., Helvering v. Credit Alliance Corp. (1942) 316 U.S. 107 [86 L.Ed. 1307, 62 S.Ct. 989].

Finally, this interpretation is supported by a close reading of section 121(e)(1) itself. Section 121(e)(1) states that "[no] . . . permit shall be required". By way of contrast, it does not state that "no permit may be issued". Congress has prohibited the issuance of permits in other situations,[15] so the fact that it did not do so here is noteworthy. Although it remains an open question, it appears that the RWQCBs may still issue and enforce waste discharge requirements for discharges that fall within the scope of section 121(e)(1).

Waste discharge requirements for a CERCLA response action will generally prescribe requirements for the selected response action. The existence of waste discharge requirements usually does not commit the discharger to initiate or continue the discharge, so, in most cases, the waste discharge requirements will not directly conflict with any selected response action. To the extent that the waste discharge requirements and an ROD identify different effluent limitations or other requirements, the discharger can comply with both the waste discharge requirements and the ROD by complying with the more stringent requirements. If, however, it is physically impossible for the discharger to comply with both the waste discharge requirements and the ROD, then the waste discharge requirements may be found to be unenforceable. This could occur where the waste discharge requirements include prohibitions of activities that are required under the ROD, or where the waste discharge requirements prescribe a specific engineering design and the ROD specifically prescribes a different design.

The RWQCBs' unilateral issuance of waste discharge requirements is consistent with both the language of section 121(e)(1) and the rationale behind its adoption in that it does not require the discharger to obtain a permit, nor does it delay the implementation of a response action. Therefore, the RWQCBs generally should not require the submission of a report of waste discharge, nor should they collect fees for the adoption of the waste discharge requirements, for discharges that fall within the scope of section 121(e)(1). The information needed to prepare the waste discharge requirements should be available to the RWQCB staff overseeing the response action. In order to minimize duplication, the RWQCB should attempt to harmonize

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[15] See, e.g., 16 U.S.C. § 1371(a) (permits for taking of marine mammals); 33 U.S.C. § 1342(a)(5) (NPDES permits); 33 U.S.C. § 1412(a) (ocean dumping permits).

its monitoring requirements and those required under CERCLA. A single monitoring report may suffice for both purposes.

IV. PRACTICAL CONSIDERATIONS

There may be many reasons why it is preferable for an RWQCB to unilaterally issue waste discharge requirements for an on-site CERCLA discharge. In most cases, it will be necessary for the RWQCB staff to develop draft waste discharge requirements in order to identify the substantive requirements that need to be included in the CERCLA decision document. The substantive requirements will generally be more specific and extensive than the requirements identified during the applicable or relevant and appropriate requirements (ARARs) identification process. The process for developing waste discharge requirements also involves agencies that otherwise would not be consulted under the CERCLA process, including the California Department of Fish and Game, the U.S. EPA Water Division, and local agencies. Furthermore, the issuance of waste discharge requirements provides an opportunity for the RWQCB, rather than the RWQCB staff, to decide potentially controversial issues such as the substance of the requirements and whether the discharge is on-site or not. This is noteworthy because the adoption of waste discharge requirements cannot be delegated to the Executive Officer. Water Code § 13223, subd. (a)(2).

A single set of waste discharge requirements may be preferred over a CERCLA decision document with requirements that apply to the discharge dispersed throughout the document. The single set of waste discharge requirements often assists the discharger in design and implementation, and assists the RWQCB staff in determining whether the discharger is in compliance with its requirements. The development of waste discharge requirements may avoid occasionally laborious negotiations with the lead agency and reliance on a protracted dispute resolution process. Experience has also shown that it is often easier to amend the waste discharge requirements, if necessary, than to amend a CERCLA decision document. Finally, it may be easier for an RWQCB to enforce the terms of its waste discharge requirements than a CERCLA decision document. Prior to initiating any enforcement action, however, an RWQCB should consult the interagency agreement, if one exists, to determine whether it constrains the RWQCBs' enforcement options.

V. CONCLUSION

Section 121(e)(1) restricts the ability of the RWQCBs to require that a discharger obtain waste discharge requirements for properly selected on-site discharges related to CERCLA response actions. However, the RWQCBs may choose to unilaterally issue waste discharge requirements for such discharges, subject to the caveat that this approach has not yet been tested in the courts. If an RWQCB determines that section 121(e)(1) does not apply to the discharge, then it is not restricted by CERCLA in issuing waste discharge requirements.

If you have any questions regarding this matter, please contact Philip Wyels at 7-2424 or Frances McChesney at 7-2106.

cc: Regional Water Board
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